

1 The Honorable Judge Salvador Mendoza
2 Hearing Date: May 1, 2015
3 Trial Date: August 17, 2015
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

GEORGE TERRY LANGLEY,

Plaintiff,

v.

GEICO GENERAL INSURANCE
COMPANY,

Defendant.

No. 1:14-cv-03069-SMJ

**MOTION TO COMPEL
APPRaisal OF PLAINTIFF'S
LOSS OF USE DAMAGES**

**NOTE ON MOTION CALENDAR:
May 1, 2015**

I. INTRODUCTION

COMES NOW Defendant Geico General Insurance Company ("GEICO"), by and through its counsel of record, Cole | Wathen | Leid | Hall, P.C., and respectfully requests that this Court issue an order compelling appraisal of plaintiff's loss of use damages as there is a value dispute between the parties.

II. FACTS

GEICO relies upon this Court's recitation of background facts and procedural background set forth in ECF No. 119, incorporates the same herein, and sets forth additional facts only as necessary to support this motion.

1 Plaintiff's Complaint contains an allegation for loss of use of the subject
2 RV. ECF No. 102 at 2. GEICO moved for partial summary judgment on
3 plaintiff's loss of use claim on February 13, 2015, alleging that plaintiff's loss of
4 use amounts to zero. ECF No. 73. This Court allowed plaintiff's loss of use
5 claim to proceed on the basis that valuation of the RV's lost use was not fixed by
6 plaintiff's inability to operate the vehicle at the time of loss. ECF No. 119 at 14-
7 16.

8 GEICO insured plaintiff's RV under policy number 4262593512. ECF No.
9 6-A. The policy provides that when GEICO and an insured cannot agree as to the
10 amount of damages as the result of a covered loss, either party may invoke
11 "appraisal" under the Policy. The "appraisal process" is set forth as follows:
12
13

14 SECTION III: PHYSICAL DAMAGE COVERAGES
15 CONDITIONS
16 6. APPRAISAL

17 If **we** and the **insured** do not agree on the amount of **loss**, either
18 may, within 60 days after proof of loss is filed, demand an appraisal
19 of the **loss**. In that event, we and the **insured** will each select a
20 competent appraiser. The appraisers will select a competent and
21 disinterested umpire. The appraisers will state separately the **actual**
22 **cash value** and the amount of the **loss**. If they fail to agree, they will
23 submit the dispute to the umpire. An award in writing of any two
will determine the amount of the **loss**. We and the **insured** will each
pay his chosen appraiser and will bear equally the other expenses of
the appraisal and umpire.

ECF No. 6-A at 16 (emphasis in original).

1 This Court previously ordered appraisal of the pre-loss value of the RV on
2 August 29, 2014. ECF No. 25. On January 9, 2015, plaintiff's expert and
3 appraiser, David Smith, provided a report at his deposition detailing loss of use
4 damages in excess of \$156,039.82. **Exhibit A.** GEICO maintains that plaintiff's
5 loss of use damages are zero. *See* ECF No. 73.
6

7 Accordingly, the parties do not agree on the amount of loss of use damages
8 – a component of the loss contemplated under the appraisal provision of the
9 policy. Mr. Smith's report was not provided before GEICO's initial motion to
10 compel appraisal. On April 17, 2015, counsel for GEICO sent plaintiff a letter
11 requesting appraisal of plaintiff's alleged loss of use damages. **Exhibit B.** No
12 response was forthcoming. Decl. of Jonathan R. Missen. GEICO now
13 respectfully moves this Court to include plaintiff's loss of use claim in the May
14 28, 2015, appraisal.
15

16 **III. EVIDENCE RELIED UPON**
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- 18 1. Declaration of Jonathan R. Missen with attached exhibits thereto;
19 and
20 2. The pleadings and file herein.

21 **IV. LEGAL ARGUMENT**
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23 **A. Legal Standard Applicable to Appraisal Provisions**

1 Washington courts have long upheld and enforced appraisal clauses in
2 insurance policies “upon the grounds of sound public policy. They tend to (sic)
3 fair dealing and to the prevention of litigation.” *Keesling v. Western Fire Ins. Co.*,
4 10 Wash. App. 841, 846, 520 P.2d 622, 626 (1974); See also: *State Farm General*
5 *Ins. Co. v. Emerson*, 102 Wn.2d 477, 480, 687 P.2d 1139 (1984). Courts construe
6 insurance policies as contracts. *Quadrant Corp. v. American States Ins. Co.*, 154
7 Wn.2d 165, 171 (2005). “[I]f the policy language is clear and unambiguous,” the
8 court “must enforce it as written;” the court “may not modify it or create
9 ambiguity where none exists.” *Id* at 171.

11 **B. Appraisal on Loss of Use is Appropriate because it is Part of the Loss
12 and There is a Value Dispute.**

13 An insurance policy is a contract and is to be construed according to the
14 general rules applicable to all contracts. The GEICO policy sets forth the
15 procedure and scope of “appraisal” in detail:

16 APPRAISAL

18 If **we** and the **insured** do not agree on the amount of **loss**, either
19 may, within 60 days after proof of loss is filed, demand an appraisal
20 of the **loss**. In that event, **we** and the **insured** will each select a
21 competent appraiser. The appraisers will select a competent and
22 disinterested umpire. The appraisers will state separately the **actual**
23 **cash value** and the amount of the **loss**. If they fail to agree, they will
submit the dispute to the umpire. An award in writing of any two
will determine the amount of the **loss**. **We** and the **insured** will each
pay his chosen appraiser and will bear equally the other expenses of
the appraisal and umpire.

1 ECF No. 6-A at 16 (emphasis in original).

2 Pursuant to the policy, if the parties “do not agree on the amount of loss,
3 either may, within 60 days after proof of loss is filed, demand an appraisal of the
4 loss.” In compelling appraisal of the pre-loss value of the RV, this Court
5 previously determined that plaintiff never filed a proof of loss. ECF No. 25 at 4.
6 There is now a disagreement about both the pre-loss value of the RV and the
7 value of plaintiff’s loss of use of the RV, if any. Because a valuation dispute has
8 arisen, GEICO seeks to have the May 28, 2015, appraisal include loss of use.

9
10 As this Court has recognized, appraisal is not “essentially a private
11 arbitration” as contended by plaintiff. ECF No. 119 at 18. Compliance with the
12 appraisal provision of the policy, when properly invoked as GEICO has done, is
13 mandatory. The unambiguous policy language states that if the parties do not
14 agree on “the amount of the loss” then the matter is subject to appraisal.

15
16 Plaintiff’s expert and appraise produced a report detailing excessive loss of
17 use damages. GEICO disputes these damages and demands appraisal under the
18 policy. GEICO requested that plaintiff consent to inclusion of his loss of use
19 damages in the appraisal, but plaintiff failed to respond. Therefore, GEICO
20 respectfully requests this Court issue an order compelling appraisal of plaintiff’s
21 loss of use damages at the appraisal hearing currently set for May 28, 2015.
22

V. CONCLUSION

For the reasons stated above, GEICO respectfully requests that this Court enter an order compelling plaintiff to submit to appraisal of his loss of use damages at the May 28, 2015, appraisal hearing.

DATED this 24th day of April, 2015, in Seattle, Washington.

COLE | WATHEN | LEID | HALL, P.C.

/s/Rory W. Leid
Rory W. Leid, III, WSBA #25075

/s/Jonathan R. Missen
Jonathan R. Missen, WSBA #42689
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1 **CERTIFICATE OF SERVICE**

2 The undersigned makes the following declaration certified to be true under
3 penalty of perjury pursuant to RCW 9A.72.085:

4 On the date given below, I hereby certify that I caused the foregoing to be
5 filed using the United States District Court for Eastern District of Washington –
6 Document Filing System (CM/ECF) and a true and correct copy to be delivered
7 on the following in the manner indicated:

<u>Plaintiff Counsel</u> David B. Trujillo Law Offices of David B. Trujillo 4702A Tieton Drive Yakima, WA 98908 (509) 972-3838 WSBA #25580	<input type="checkbox"/> Via Fax (509) 972-3841 <input type="checkbox"/> Via ABC Legal Messenger <input type="checkbox"/> Via Email tdtrujillo@Yahoo.com <input type="checkbox"/> By Depositing Into U.S. Mail 1 st Class Postage Pre-Paid <input checked="" type="checkbox"/> Via ECF/Electronic Court Filing
<u>Plaintiff Counsel</u> Kirk D. Miller Kirk D. Miller, P.S. 421 W. Riverside Ave., Ste. 704 Spokane, WA 99201 (509) 413-1494 WSBA # 40025	<input type="checkbox"/> Via Fax <input type="checkbox"/> Via ABC Legal Messenger <input type="checkbox"/> Via Email kmiller@millerlawspokane.com <input type="checkbox"/> By Depositing Into U.S. Mail 1 st Class Postage Pre-Paid <input checked="" type="checkbox"/> Via ECF/Electronic Court Filing

15 I certify under penalty of perjury under the laws of the State of Washington
16 that the foregoing is true and correct

17 Executed this 24th day of April, 2015, at Seattle, Washington.

18 **COLE | WATHEN | LEID | HALL, P.C.**

19 /s/ Tami L. Foster

20
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